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Nov 25, 2024

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTONCALEB L.,¹

Plaintiff,

v.

MARTIN O'MALLEY,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 2:23-CV-00200-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION AND REMANDING THE
MATTER FOR FURTHER
PROCEEDINGS**

ECF Nos. 11, 13

Before the Court are Plaintiff's Amended Opening Brief and the Commissioner of Social Security's Brief in response, which have been entered on the docket as motions. ECF Nos. 11, 13. Attorney Asa LaMusga represents Plaintiff; Special Assistant United States Attorney David J. Burdett represents the

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Pursuant to Federal Rule of Civil Procedure 25(d), Martin O'Malley, Commissioner of Social Security, is substituted as the named Defendant.

1 Defendant. After reviewing the administrative record and the briefs filed by the
2 parties, the Court **GRANTS** Plaintiff's Motion, ECF No. 11, **DENIES**
3 Defendant's Motion, ECF No. 13, and the decision of the Commissioner is
4 **REVERSED** and remanded for further proceedings.

5 **JURISDICTION**

6 Plaintiff filed an application for Child's Disability Insurance Benefits on
7 August 23, 2004 and filed an application for Supplemental Security Income on
8 February 1, 2019, alleging amended onset of disability since February 13, 2019.
9 Tr. 84, 95, 211-25, 523. Administrative Law Judge (ALJ) Jesse K. Shumway held
10 a hearing on September 9, 2020, Tr. 38-67, and issued an unfavorable decision on
11 October 23, 2020. Tr. 12-30. The Appeals Council denied Plaintiff's request for
12 review. Tr. 1-6. Plaintiff filed an action in the Eastern District of Washington and
13 on December 27, 2021, the Court granted the parties' stipulated motion for
14 remand, reversing and remanding the claim for further proceedings. Tr. 545-47.
15 In May 2022, the Appeals Council vacated the ALJ's decision and remanded the
16 claim to the ALJ. Tr. 557-59.³

17 ALJ Shumway held a remand hearing on August 25, 2022, Tr. 484-19, and
18 issued another unfavorable decision on September 9, 2022. Tr. 464-83. The
19

20 ³ The Appeals Council noted Plaintiff filed a subsequent claim for Title II and Title
XVI benefits in July 2021 and that the remanded claim rendered the subsequent

1 Appeals Council did not assume jurisdiction of the case, and the ALJ's September
2 2022 decision became the final decision of the Commissioner, which is appealable
3 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
4 judicial review on July 17, 2023. ECF No. 1.

5 **STANDARD OF REVIEW**

6 The ALJ is tasked with "determining credibility, resolving conflicts in
7 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,
8 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
9 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
10 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
11 only if it is not supported by substantial evidence or if it is based on legal error.
12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
13 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
14 1098. Put another way, substantial evidence "is such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
16 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305
17 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational

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19 claims duplicate. Tr. 559. The Appeals Council ordered the ALJ to consolidate
20 the claim files, associate the evidence, and issue a new decision on the
consolidated claims. *Id.*

1 interpretation, the Court may not substitute its judgment for that of the ALJ.
2 *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595,
3 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or
4 if conflicting evidence supports a finding of either disability or non-disability, the
5 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
6 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
7 set aside if the proper legal standards were not applied in weighing the evidence
8 and making the decision. *Brawner v. Sec'y of Health and Human Servs.*, 839 F.2d
9 432, 433 (9th Cir. 1988).

10 **SEQUENTIAL EVALUATION PROCESS**

11 The Commissioner has established a five-step sequential evaluation process
12 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
13 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
14 four the claimant bears the burden of establishing a *prima facie* case of disability.
15 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes
16 that a physical or mental impairment prevents the claimant from engaging in past
17 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot
18 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to
19 the Commissioner to show (1) that Plaintiff can perform other substantial gainful
20 activity and (2) that a significant number of jobs exist in the national economy

1 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir.
2 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot
3 make an adjustment to other work in the national economy, the claimant will be
4 found disabled. 20 C.F.R. § 404.1520(a)(4)(v), 416.920(a)(4)(v).

5 STATEMENT OF FACTS

6 The facts of the case are set forth in detail in the transcript of proceedings
7 and the ALJ's decision and only briefly summarized here. Plaintiff was born in
8 2001 and was 18 years old on the amended alleged onset date. Tr. 23. Plaintiff's
9 diagnoses include borderline intellectual functioning, ADHD, and autism spectrum
10 disorder. *See, e.g.*, Tr. 18, 77, 330, 354-56. He was homeschooled and does not
11 have a high school diploma. Tr. 328, 342. His employment has consisted of part-
12 time work as a custodian/janitor on Fairchild Airforce Base for non-profit agency,
13 SkilsKin, through the AbilityOne Program, a federal program and organization that
14 helps individuals with disabilities find employment. *See, e.g.*, Tr. 18, 62-65, 311,
15 342, 766, 807-09, 813-14, 851-61.

16 CHILD'S DISABILITY INSURANCE BENEFITS

17 Title II of the Social Security Act provides disabled child's insurance
18 benefits based on the earnings record of an insured person who is entitled to old-
19 age or disability benefits or has died. 42 U.S.C. § 402(d); 20 C.F.R. § 404.350(a).
20 The same definition of "disability" and five-step sequential evaluation outlined

1 above governs eligibility for disabled child's insurance benefits. *See* 42 U.S.C. §
2 423(d); 20 C.F.R. § 404.1520(a)(1)-(2). In addition, in order to qualify for
3 disabled child's insurance benefits several criteria must be met. 20 C.F.R. §
4 404.350(a)(1)-(5). As relevant here, if the claimant is over 18, the claimant must
5 "have a disability that began before [he] became 22 years old." 20 C.F.R. §
6 404.350(a)(5).

7 **ADMINISTRATIVE DECISION**

8 On September 9, 2022, the ALJ issued a decision finding Plaintiff was not
9 disabled as defined in the Social Security Act. Tr. 464-83.

10 The ALJ found Plaintiff was born on February 13, 2001, and had not
11 attained age 22 as of February 13, 2019, the amended alleged onset date. Tr. 470.

12 At step one, the ALJ found Plaintiff had engaged in substantial gainful
13 activity during the period at issue, and that there had been no continuous 12-month
14 period since the amended alleged onset date in which Plaintiff had not performed
15 substantial gainful activity. Tr. 470-74.

16 The ALJ thus concluded Plaintiff was not under a disability within the
17 meaning of the Social Security Act at any time from February 13, 2019, the
18 amended alleged onset date, through the date of the decision. Tr. 474.

19 **ISSUES**

1 Plaintiff seeks judicial review of the Commissioner's final decision denying
2 him disability benefits under Title II and Title XVI of the Social Security Act. The
3 question presented is whether substantial evidence supports the ALJ's decision
4 denying benefits and, if so, whether that decision is based on proper legal
5 standards. The sole issue Plaintiff raises for review is whether the ALJ conducted
6 a proper step-one analysis. ECF No. 11 at 2.

7 **DISCUSSION**

8 Plaintiff contends the ALJ erred in finding Plaintiff's employment
9 constituted substantial gainful activity. ECF No. 11 at 13-18. At step one of the
10 sequential evaluation process, the ALJ considers the claimant's work activity. 20
11 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is engaged in
12 "substantial gainful activity," the ALJ must find that the claimant is not disabled.
13 20 C.F.R. §§ 404.1520(b); 416.920(b). "Substantial gainful activity is work done
14 for pay or profit that involves significant mental or physical activities." *Lewis v.*
15 *Apfel*, 236 F.3d 503, 515 (9th Cir. 2001). Earnings over the amount specified in
16 statutory guidelines creates the presumption of substantial gainful activity (SGA).
17 *Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990); *see* 20 C.F.R. § 404.1574.
18 The presumption is rebuttable based on analysis of five factors: (1) the nature of
19 Plaintiff's work, (2) Plaintiff's performance, (3) special conditions under which
20 work was performed, (4) whether Plaintiff was self-employed, and (5) the amount

1 of time that Plaintiff was able to spend working. 20 C.F.R. §§ 404.1573, 416.973;
2 see also *Katz v. Sec'y of Health and Human Servs.*, 972 F.2d 290, 293 (9th Cir.
3 1992).

4 In terms of the third factor, special conditions under which the work was
5 performed, the regulations provide:

6 the work you are doing may be done under special conditions that take into
7 account your impairment, such as work done in a sheltered workshop . . . if
8 your work is done under special conditions, we may find that it does not
9 show that you have the ability to do [SGA]. However, work done under
10 special conditions may show that you have the necessary skills and ability to
11 work at the [SGA] level.

12 20 C.F.R. §§ 404.1573(c), 416.973(c). This section lists six examples of special
13 conditions relating to a claimant's impairment: (1) Plaintiff required and received
14 special assistance from other employees in performing work; (2) Plaintiff was
15 allowed to work irregular hours or take frequent rest periods; (3) Plaintiff was
16 provided with special equipment or was assigned work especially suited to his
17 impairment; (4) Plaintiff was able to work only because of specially arranged
18 circumstances, for example, other persons helped him prepare for or get to and
19 from work; (5) Plaintiff was permitted to work at a lower standard of productivity
20 or efficiency than other employees; or (6) Plaintiff was given the opportunity to
work, despite his impairment, because of family relationship, past association with
employer, or the employers concern for his welfare. 20 C.F.R. §§ 404.1573,
416.973. Relatively minor accommodations by an employer do not constitute

1 special conditions, and to establish work under special conditions, a claimant must
2 show that his “work environment was the equivalent of a sheltered workshop.”
3 *Katz*, 972 F.2d at 294.

4 The ALJ found that Plaintiff engaged in SGA during the period at issue; that
5 his work did not constitute an unsuccessful work attempt and was not sheltered or
6 subsidized employment; and that Plaintiff failed to rebut the presumption of SGA.
7 Tr. 470-74. Plaintiff contends this was error. Plaintiff claims: (1) the ALJ’s
8 finding Plaintiff was performing within or very close to competitive norms was not
9 supported by substantial evidence; (2) the ALJ misunderstood the vocational
10 expert testimony at the most recent hearing, as a prior vocational expert who was
11 familiar with Plaintiff’s employment testified it was sheltered; and (3) the ALJ
12 failed to consider other special conditions that indicate Plaintiff’s work is sheltered
13 or done under special circumstances, including the testimony of Plaintiff’s mother,
14 the medical opinion of Dr. Campbell, and the statement of Plaintiff’s project
15 manager at work. ECF No. 11 at 15-18. Defendant contends that substantial
16 evidence supports the ALJ’s determination and Plaintiff failed to rebut the
17 presumption that he engaged in SGA. ECF No. 13 at 2-10.

18 The Court finds that the ALJ’s findings are not supported by substantial
19 evidence and the ALJ erred in failing to develop the record. As determined by the
20 ALJ, records show plaintiff’s earnings raise a presumption of SGA level

1 employment during some of the period at issue. Tr. 470-71. The ALJ, however,
2 failed to properly consider special conditions relating to plaintiff's employment or
3 the evidence as a whole in concluding that Plaintiff did not rebut the presumption
4 of SGA. The record shows Plaintiff's job may not have involved SGA because
5 Plaintiff worked in a sheltered workshop or similar environment under special
6 conditions that accommodated his impairments. At the first hearing the vocational
7 expert testified that the organization employing Plaintiff provides a sheltered
8 workshop. ECF No. 11 at 10; *see* Tr. 62-64.

9 In addition, this Court's 2021 remand order and the 2022 Appeals Council
10 remand order both instructed the ALJ to reconsider the opinion evidence as well as
11 Plaintiff's testimony, particularly as these related to Plaintiff's work activity and
12 ability to maintain competitive employment. Tr. 546, 557-59. The May 2022
13 Appeals Council order found that the ALJ did not provide an adequate evaluation
14 of the medical opinions and Plaintiff's symptom claims related to Plaintiff's
15 employment and instructed the ALJ to further consider the medical and other
16 opinion evidence, as well as Plaintiff's symptom claims. Tr. 557-59. Instead of
17 reassessing the evidence as instructed, however, the ALJ concluded that the
18 Plaintiff's "earnings since the previous hearing render moot the issues raised in the
19 remand order" and that because of the step one findings "the remaining issues in
20 the remand order cannot be addressed." Tr. 470. The ALJ failed to properly

1 assess evidence relevant to the step one analysis, however, including evidence
2 related to Plaintiff's work activity and ability to maintain competitive employment
3 as ordered by this Court. Accordingly, the ALJ's analysis is insufficient.

4 The ALJ also concluded that "the evidence was insufficient to demonstrate
5 that the Plaintiff's earnings are subsidized at all," because the ALJ could not verify
6 a subsidy from Plaintiff's employer. Tr. 472. The ALJ referenced Agency
7 guidance, specifically Social Security Ruling (SSR) 83-33, *Title II and XVI: Determining Whether Work is Substantial Gainful Activity – Employees*, but failed
8 to assess, for example, any of the "circumstances indicating the strong possibility
9 of a subsidy," including analysis of whether Plaintiff's employment was sheltered,
10 involvement of childhood disability and/or mental impairments, the nature and
11 severity of Plaintiff's impairments, and whether Plaintiff was involved in a
12 government-sponsored job training or employment program. SSR 83-33, available
13 at 1983 WL 31255 (1983) at *4. Despite evidence of record showing most/all of
14 these factors, the ALJ concluded that Plaintiff's employment did not include a
15 subsidy and did not constitute sheltered employment with limited to no analysis or
16 use of the tests within the Agency guidance he cited.⁴ Tr. 472-74.

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20 ⁴ Sheltered employment is "employment provided for handicapped individuals in a protected environment under an institutional program." SSR 83-33 at *7.

1 Additionally, the ALJ has an independent duty to develop the record fully
2 and fairly in order to make a fair determination as to disability, even where, as
3 here, the claimant is represented by counsel. *Celaya v. Halter*, 332 F.3d 1177,
4 1183 (9th Cir. 2003); *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
5 2001); *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1995). “Ambiguous evidence,
6 or the ALJ’s own finding that the record is inadequate to allow for proper
7 evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an appropriate
8 inquiry.’” *See Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen v. Chater*, 80 F.3d
9 1273, 1288 (9th Cir. 1996)). Upon finding the record insufficient, the ALJ had a
10 duty to develop the record and failed to do so. The ALJ had information from
11 Plaintiff’s employer, as well as vocational expert testimony from a prior hearing
12 indicating that the organization that employed Plaintiff provided sheltered
13 employment for people with disabilities, yet the ALJ failed to address these in the
14 decision beyond noting that “supervisors at his job confirmed his employment, and
15 they provided comments about the [Plaintiff’s] job duties and ‘supports.’” Tr. 471
16 (citing Tr. 807-90, 813-16, 850-61). Review of the exhibits cited by the ALJ,
17 however, shows documentation including annual “Individual Eligibility
18 Evaluations” dated 2019, 2020, and July 2022, which indicated Plaintiff was not
19 capable of competitive employment at that time and detailed functional limitations
20 in communication, self-care, self-direction, work tolerance, and work skills, along

1 with a list of accommodations provided to Plaintiff for each limitation. Tr. 807-09.
2 Other documentation includes a 2022 letter from program staff, Ms. Garcia, that
3 described Plaintiff's job, indicated Plaintiff had a "supervisor who specializes in
4 working with individuals with disabilities," and explained some of Plaintiff's
5 limitations and accommodations. Tr. 813-14. The ALJ discounted the
6 documentation and statements from Plaintiff's employer and concluded they were
7 "simply providing general employment information and impressions about the
8 claimant's functional abilities." Tr. 472. This is not an accurate characterization
9 of the evidence.

10 Review of the 2022 hearing testimony also shows that the vocational expert
11 at the remand hearing was not provided recent documentation, including Ms.
12 Garcia's statement, which was admitted at the 2022 hearing. Tr. 488, 516-17.
13 While this vocational expert testified that he was not familiar with the organization
14 that employed Plaintiff, he also testified the work sounded "more like an
15 accommodation, like you'd find jobs through a workshop or something like that."
16 Tr. 508, 513. The ALJ failed to assess relevant evidence and/or to further develop
17 the record concerning special conditions of employment before denying the claim
18 at step one, and the ALJ's findings are not supported by substantial evidence.

19 The ALJ failed to perform an adequate step one analysis, including
20 assessment of whether the evidence of special conditions/sheltered work rebutted

1 the presumption that Plaintiff's work was SGA; and the ALJ failed to properly
2 develop the record. Accordingly, the ALJ's findings are not supported by
3 substantial evidence. On remand the ALJ will reperform the sequential analysis,
4 including the step one analysis.

5 CONCLUSION

6 Having reviewed the record and the ALJ's findings, the Court concludes the
7 ALJ's decision is not supported by substantial evidence and not free of harmful
8 legal error. The Court finds further proceedings are necessary to develop the
9 record in regard to Plaintiff's employment, as well as to revisit and follow this
10 Order, the Court's December 2021 remand order and the subsequent Appeals
11 Council order. The ALJ will further develop the record with medical expert
12 testimony and/or a consultative exam to assist in determining Plaintiff's level of
13 functioning. The ALJ is instructed to perform the sequential analysis anew,
14 making new findings on each of the five steps of the sequential evaluation process,
15 to reassess all opinion evidence, and to reassess plaintiff's subjective complaints,
16 taking into consideration any other evidence or testimony relevant to Plaintiff's
17 disability claim.

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1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiff's Motion, **ECF No. 11**, is **GRANTED**. The Commissioner's
3 decision is **REVERSED** and this matter is **REMANDED** for further
4 administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

5 2. Defendant's Motion, **ECF No. 13**, is **DENIED**.

6 3. Upon proper presentation, the Court will consider Plaintiff's application
7 for fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

8 The District Court Executive is directed to update the docket sheet to reflect
9 the substitution of Martin O'Malley as Defendant, enter this Order, **ENTER**
10 **JUDGMENT** in favor of Plaintiff, forward copies to counsel, and **CLOSE THE**
11 **FILE**.

12 DATED November 25, 2024.

13 *s/Robert H. Whaley*
14 ROBERT H. WHALEY
15 Senior United States District Judge